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No. 82-1915

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA,
Petitioner,

vs.

VINCENT HARVIER, as Chairman of the Quechan Tribal Council, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Petitioner's reply to brief in opposition	1
I	
The respondents incorrectly argue that the majority opinion does not reach the merits of the tribal immunity issue	1
II	
If the respondents' interpretation of ex parte Young is correct, California cannot automatically substitute successor tribal officers in its complaint	4
III	
California could not have amended its complaint, and thus the dismissal order was appealable even under the Ninth Circuit's restrictive interpretation of the finality rule	5
IV	
The respondents' brief contains several mischaracterizations of the issues in the case	7
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases

	Page
Edelman v. Jordan, 415 U.S. 651 (1974)	1
Ex parte Young, 209 U.S. 123 (1908)	passim
Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949)	1, 6
New Mexico v. Mescalero Apache Tribe, ... U.S. ....., 51 U.S.L.W. 4741 (1983)	8

Rule

Federal Rule of Civil Procedure, Rule 25(d)(1)	4

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This brief is in reply to the respondents' brief opposing the petition for writ of certiorari.

I

THE RESPONDENTS INCORRECTLY ARGUE THAT THE MAJORITY OPINION DOES NOT REACH THE MERITS OF THE TRIBAL IMMUNITY ISSUE

The respondents' main argument in their opposing brief is that the majority opinion decided only a narrow issue concerning the appealability of dismissal orders, and did not reach the merits of the tribal immunity issue under *Ex parte Young*, 209 U.S. 123 (1908). Res. Br. 7-10. Thus, it is argued, no reviewable tribal immunity issue is before this Court. *Id.*

In fact, the majority opinion is based on a specific, and we believe faulty, interpretation of the *Ex parte Young* doctrine as applied in the tribal context. Under this doctrine, actions can be maintained against sovereign officials to restrain unlawful conduct undertaken on behalf of the sovereign, but not to obtain monetary relief that would be ultimately paid out of the sovereign treasury. *Ex parte Young,* 209 U.S. 123, 155-156 (1908); *Edelman v. Jordan,* 415 U.S. 651, 664 (1974). In other words, the doctrine authorizes suits for prospective but not retrospective relief. *Edelman,* 415 U.S. at 664. Importantly, the immunity of the sovereign official depends on whether the complaint seeks prospective or retrospective relief, not on whether he is *named* in the complaint in an "official" or "individual" capacity.[1] Indeed, in *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 687 (1949), this Court stated:

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[1]In *Ex parte Young,* the Court held that a state official, in order to be sued, "must have some connection with the enforcement of the act," 209 U.S. at 157, and that a state official could not be sued where he had "no duty at all with regard to the act," *id.* at 158. In *Edelman,* the Court held that *Ex parte Young* bars actions for "retrospective" but not "prospective" relief against the state. 415 U.S. at 664.

> "If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. . . . But controversy there has been, in this field above all others, because it has long been established that *the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign.*" (Emphasis added.)

Therefore, the immunity question turns on the nature of relief sought, not the denomination of the defendant in the complaint.

The majority opinion below was thus wrong in holding that California *may* have been able to state a valid claim simply by amending its complaint to name the tribal officers in their "individual" capacity.[2] Since, under *Ex parte Young,* the immunity of the officer depends on the nature of relief sought rather than the styling of the complaint, the district court, in dismissing the complaint, necessarily held that California could not obtain the relief sought regardless of the styling of the complaint.[3] Indeed, if the district court meant to hold the opposite—that California

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[2]Significantly, the majority opinion does not hold that California *can* obtain the desired relief by changing the styling of the complaint, but only that California must change the styling before the question is addressed.

[3]Indeed, the district court order made this result clear, stating that the case is brought against the defendants in their "representative" capacities in part because "the relief sought would compel the defendants to act as representatives of the tribe." Pet. App. 22. Even if California amended its complaint to name the defendants in their "individual" capacities, it would still seek relief that "would compel the defendants to act as representatives of the tribe." Also, as indicated in the petition, the district court indicated in other ways that California could not obtain relief against the tribal officials that would indirectly affect the Tribe itself. Pet. App. 4 n. 3 and accompanying text.

could obtain such relief simply by changing the styling of the complaint—it would have misapplied *Ex parte Young,* which as noted above holds just the opposite. Thus, the dismissal order effectively precluded California from obtaining the relief sought, regardless of the styling of the complaint. Unless the Court grants the petition for writ of certiorari, the case is over for all practical purposes, assuming a proper interpretation of *Ex parte Young.*

The majority opinion thus took a contorted view of the *Ex parte Young* doctrine as applied in the tribal context. Under the majority opinion, California may have been able to obtain the same relief simply by changing the labels in the complaint. This result simply elevates form over substance. We are unaware of any decision holding that *Ex parte Young* focuses on form rather than substance. Indeed, as explained above, *Ex parte Young* and its progeny clearly focus on the relief sought, not on the styling of the complaint. Thus, the majority opinion, in looking to the form of the complaint rather than its substance, fundamentally misconceives *Ex parte Young* as applied to tribal officers.

To put it more simply, either California can sue tribal officers to restrain unlawful tribal conduct, or it cannot. If it can, the form of the complaint—in terms of whether the defendants are named as "officers" or "individuals"—is irrelevant. If it cannot, it cannot avoid the encumbrance simply by changing the form of the complaint.

The respondents are thus wrong in arguing that the majority opinion fails to reach the tribal immunity issue. Rather, the majority opinion, although purportedly deciding a narrow question concerning the appealability of dismissal orders, is predicated on an anomalous, unprecedented view of the *Ex parte Young* doctrine as applied to tribal officers. Thus, the respondents' entire argument—that California should have followed *Ex parte Young* by

amending its complaint—begs the very question raised in the petition. In California's judgment, it *has* followed *Ex parte Young*. Thus, the issue here is the proper interpretation and application of *Ex parte Young* in the tribal context. The majority opinion necessarily resolved this issue in holding that the dismissal order was nonappealable. Its decision, in our view, is fundamentally wrong. In any event, this Court should grant the petition to review the question.

II

IF THE RESPONDENTS' INTERPRETATION OF EX PARTE YOUNG IS CORRECT, CALIFORNIA CANNOT AUTOMATICALLY SUBSTITUTE SUCCESSOR TRIBAL OFFICERS IN ITS COMPLAINT

As explained in the petition, a main reason that California brought its action against the tribal officers in their "official" capacity is to ensure that the judgment binds the office, and not the individual who temporarily occupies it. Pet. 18-19. The respondents argue that the automatic substitution rule, contained in Federal Rule of Civil Procedure 25(d)(1), provides for automatic substitution of successor tribal officers. Res. Br. 18. This rule, which was not quoted by the respondents, provides:

> "When a public officer is a party to an action *in his official capacity* and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party." (Emphasis added.)

The automatic substitution rule thus applies only to actions against an officer "in his official capacity." If, as California argues, the capacity of the tribal officer is determined by the nature of relief sought rather than the styling of the complaint, then the automatic substitution rule would apply in *any* action against a sovereign officer

to restrain unlawful conduct. If, however, the respondents and majority opinion are correct in the view that the officer's capacity is determined by the styling of the complaint, the automatic substitution rule would apparently not apply if, as the majority opinion insists, California amends its complaint to name the defendants in their "individual" capacity. Under these circumstances, the action would *not* be against the defendants in their "official" capacity, and thus would not fall under the automatic substitution rule. In short, if the respondents and majority opinion are correct in their analysis of *Ex parte Young*, the automatic substitution rule would apparently not apply if California amends its complaint, and the judgment would not apply to successor tribal officers.

III

CALIFORNIA COULD NOT HAVE AMENDED ITS COMPLAINT, AND THUS THE DISMISSAL ORDER WAS APPEALABLE EVEN UNDER THE NINTH CIRCUIT'S RESTRICTIVE INTERPRETATION OF THE FINALITY RULE

The respondents argue that California should have amended its complaint prior to appealing the dismissal order, and that its failure to do so renders the dismissal order nonappealable. Res. Br. 7-10. As explained above, California could not have possibly saved its complaint by amendment, assuming a proper interpretation of *Ex parte Young*. Under this result, the dismissal order was final and appealable even under the Ninth Circuit's more restrictive interpretation of the finality rule. Therefore, although we believe that the Ninth Circuit's interpretation of the finality rule is wrong and should be reviewed by this Court, Pet. 21-23, the result should be the same regardless of the proper interpretation of the rule.

The respondents' argument that the district court extended an "invitation" to California to amend its com-

plaint, Res. Br. 3, and that California "stubbornly" declined the invitation, *id.* at 21, marks a revisionist approach to the actual proceedings in the district court. As noted earlier, the district court held that California could not obtain the relief which was sought in the complaint. See note 3, *supra,* and accompanying text. Indeed, the respondents forcefully argued in support of their dismissal motion that the tribal immunity doctrine extends both to the Tribe and to tribal officers, and thus that California cannot obtain relief against the officers that would affect the Tribe itself.[4] They repeated this argument in the Court of Appeals, asserting that the *Larson* doctrine does not apply to Indian tribes or officials and that actions can-

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[4]The respondents' brief in support of the dismissal motion stated:

"The present action seeks precisely the same relief sought in *People of the State of California v. Quechan Tribe of Indians,* 595 F.2d 1153 (9th Cir., 1979). In that action plaintiff also sought declaratory relief against the Quechan Tribe of Indians regarding the right to enforce its Fish and Game laws within the Fort Yuma Reservation. The Court concluded that the Tribe's sovereign immunity barred California's suit.

"In the instant action, plaintiff is apparently attempting to relitigate the identical issues by use of the transparent device of naming the officers of the Quechan Tribe (i.e. the Tribal Chairman, Council, and Game Warden), and suing them in their capacity as such.

"However, *sovereign imunity extends not only to the Tribe itself, but also to its officers, its agents, and its employees.* Accordingly, the Tribal Chairman, Council Members, and Game Warden, all fall within such protection.

"Thus, it is neither necessary nor permissible for the Court to reach the merits of plaintiff's claims, because all such claims against all the named defendants are barred by tribal sovereign immunity from unconsented suit.

"For these reasons, the Court should *dismiss the present action* for lack of personal and/or subject matter jurisdiction and quash service of summons on the named defendants." Def. Mem. of Points and Authorities, at 2 (emphasis added).

not be maintained against tribes or officials in the absence of express congressional authorization. Pet. 15 n. 8.

It is thus clear that, both under a proper interpretation of *Ex parte Young* and as a result of the actual proceedings in the district court, California could not have saved its complaint by amendment. The respondents, in now suggesting otherwise, are attempting to rationalize the lower decisions. Their disingenuous comment that California "shot itself in the foot" by not amending the complaint, Res. Br. 25, distorts what actually occurred at the district court level. In attempting to rationalize the lower decisions, the respondents now assert a different view of the tribal immunity doctrine than they asserted below; they argued below that the *Ex parte Young* doctrine does not apply to tribal officials, see note 4, *supra;* Pet. 15 n. 8, and they now argue that, although the doctrine may apply to tribal officials, it does not apply here because of the form of the complaint. We do not suggest, of course, that the Court should grant the petition simply because the respondents have changed their position. Rather, in attempting to rationalize the lower decisions, the respondents now provide an interpretation of *Ex parte Young* that is fundamentally wrong. As explained above, their present interpretation means that the doctrine focuses on the form rather than the substance of the complaint, which in turn means that any judgment apparently does not apply to successor tribal officers.

IV

THE RESPONDENTS' BRIEF CONTAINS SEVERAL MISCHARACTERIZATIONS OF THE ISSUES IN THE CASE

Finally, the respondents' brief contains several inexcusable mischaracterizations of the issues raised here. First, the respondents mischaracterize the constitutional issue by asserting that California first disclaimed, and then later

adopted, the argument that the defendants' action is unconstitutional. Res. Br. 14-16. As Judge Norris correctly observed in his dissenting opinion, California "seeks a declaration that the tribal ordinance . . . is in conflict with federal law, including federal statutes," and "if its theory is correct, the ordinance may offend the Supremacy Clause" . . . ." Pet. App. 13. In other words, the tribal ordinance is inconsistent with federal statutory law and federal common law, and, *for that reason*, is invalid under the Supremacy Clause. The constitutional issue arises under the Supremacy Clause, not under other constitutional provisions imposing substantive standards of conduct. Our position on this issue has been clearly and consistently expressed throughout this litigation.

Also, the respondents mischaracterize the present nature of the controversy by asserting that it has been "vitiated" by subsequent events. Res. Br. 11-14. In fact, the tribal ordinance is still in effect, and is still being enforced. Moreover, this Court's recent decision relating to tribal control of on-reservation fishing by non-Indians, see *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., 51 U.S.L.W. 4741 (1983), is not applicable here for reasons spelled out in the states' amici brief in support of the petition. See Amici Curiae Brief of States of Arizona *et al.* in Support of Petition for Writ of Certiorari, 15-16 n. 1. Moreover, the amici states have noted that they are involved in several other controversies that involve the tribal immunity issue. *Id.* at 1-4. Thus, both the legal issues and factual dispute herein are fully alive and justiciable.

Further, the respondents mischaracterize California's interests by asserting that California is more interested in pursuing a test case than obtaining resolution of the underlying dispute. Res. Br. 5, 25 n. 6. In fact, the tribal immunity issue was raised by the respondents, not by California. Indeed, California has been attempting to reach the merits of the underlying dispute for more than seven years, and

has been unable to do so because of the respondents' heretofore-successful assertion of the tribal immunity defense. Although the respondents are not to be begrudged for asserting any defenses available to them, they are hardly in a position to argue—after having raised a defense that was sustained by the lower courts—to assert that California, in attempting to overturn the lower decisions, is more interested in obtaining a decision on the defenses than on the merits.[5]

Finally, the respondents mischaracterize California's argument by asserting that California is concededly suing "the Tribe itself," supporting the assertion by quoting part of our lower brief out of context. Res. Br. 2, 6. In the *unquoted* part of our brief, we said that the action should be considered against the Tribe only in the sense that "the *effect* of our action would restrain the Tribe from acting to prevent California fish and game officials from entering the reservation to enforce California laws against non-Indians. . . ." Cal. Br. 11 (emphasis added). We thus stated only that our action, by restraining tribal officials acting on behalf of the Tribe, would in effect restrain the Tribe itself. Our understanding of the tribal immunity doctrine is that such actions are sustainable. If the respondents are

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[5]The respondents also mischaracterize the letter from the Director of the Department of Fish and Game, set forth in an appendix to the brief in opposition. Res. Br. 9. The respondents cite this letter for the proposition that California's objective in the lawsuit is to obtain resolution of the tribal immunity issue, not the merits of the case itself. *Id.* In fact, the letter indicates only that California filed a motion to expedite the appeal (which was subsequently denied) in order to "expedite" the resolution of the tribal immunity issue. Res. App. 1. Nothing in the letter suggests that California is principally interested in the tribal immunity issue, as opposed to the merits of the controversy itself. Indeed, the letter indicates just the opposite, for it makes clear that California has continued to be eager and willing to settle the case.

suggesting otherwise, they are in effect arguing that no remedy is available to restrain unlawful tribal conduct. As noted earlier, this was the same argument made by the respondents in the case below. See note 4, *supra;* Pet. 15 n. 8.

CONCLUSION

The respondents argue that "any alteration to the tribal immunity doctrine should . . . come from Congress, not the judiciary." Res. Br. 38. To the contrary, the tribal immunity doctrine is a common law doctrine, not a statutory one. It was adopted and developed by the courts, not Congress. Therefore, clarity should come from the courts. The confusion surrounding the doctrine is evident from the semantical obfuscations appearing in the lower decisions. The time has come to clarify the doctrine, and this case presents an appropriate vehicle for doing so.

Respectfully submitted,

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